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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

)  
 ) **Case No. 3:14-cv-113-EMC**  
 )  
 ) **PLAINTIFF'S OPPOSITION TO DEFENDANT'S**  
 ) **MOTION FOR RELIEF FROM NOVEMBER 26,**  
 ) **2014 NONDISPOSITIVE PRETRIAL ORDER OF**  
 ) **MAGISTRATE JUDGE**

**V.**

**Judge: Edward M. Chen**

**Defendant.**

**STATEMENT OF ISSUES TO BE DECIDED (Civil L.R. 7-4(a)(3))**

The issue to be decided in Defendant's Motion is:

1) Whether Magistrate Judge Ryu's November 26, 2014 order requiring Defendant to include Travis Kalanick and Ryan Graves as custodians for purposes of Defendant's search for electronically stored information ("ESI") was clearly erroneous or contrary to law.

1 Magistrate Judge Ryu's November 26, 2014 order requiring Defendant Uber  
 2 Technologies, Inc. ("Uber") to include Travis Kalanick and Ryan Graves as custodians for  
 3 purposes of Uber's search for electronically stored information ("ESI") was not clearly erroneous  
 4 or contrary to law. It is not just likely, but an absolute certainty, that these individuals possess  
 5 discoverable information pertinent to both the merits of the case and class certification.

6 Uber is a relatively new company and had only a few employees during the time period  
 7 relevant to this suit (*i.e.*, 2011/2012 to 2013). Ryan Graves was Uber's Vice President of  
 8 Operations during this time period, a position that – by its own terms – entails responsibility over  
 9 the operations of the company. Travis Kalanick is Uber's CEO and was heavily involved in the  
 10 creation and development of the business. Uber's assertion that its founder, CEO and driving  
 11 force of its rapid growth should be excluded from the list of custodians does not pass the straight  
 12 face test. One only needs to read a newspaper to know that he is significantly involved in Uber's  
 13 business. *See, e.g.*, <http://www.businessinsider.com/uber-travis-kalanick-bio-2014-1> ("Kalanick  
 14 has worked tirelessly to achieve this success. A friend remembers him spending the majority of  
 15 a Vegas bachelor-bachelorette party on his phone in the hot tub. But Kalanick's form of hustling  
 16 also means doing things most people wouldn't: picking fights, bending laws, challenging  
 17 governments, and throwing tantrums."). According to the documents produced to date, he also  
 18 authored several of the statements made to the public that are relevant to this suit.

19 In short, it is simply not plausible for Uber to assert that every single communication Mr.  
 20 Kalanick or Mr. Graves ever had regarding Uber taxi was with one of the five general managers.  
 21 In other words, according to Uber, Plaintiff should believe that its CEO and VP of Operations  
 22 never communicated amongst themselves, never communicated with any other executive at its  
 23 San Francisco headquarters and never communicated with any other third parties regarding  
 24 Uber's taxi service. Uber's position is untenable and Magistrate Judge Ryu properly ordered  
 25 Uber to include these individuals as ESI custodians.

26 Furthermore, the parties have already agreed on a set of search terms that will be used to  
 27 run the ESI search, which predominantly are focused on the terms "taxi" in the same document  
 28 as "gratuity" or "tip." Thus, the agreed upon ESI search parameters will substantially narrow the

1 universe of documents that need to be reviewed and will only yield documents that are clearly  
 2 relevant to this suit.<sup>1</sup> And despite its assertion that only five employees could possibly have  
 3 relevant emails, Uber asserts that using the same agreed upon search terms on Mr. Kalanick and  
 4 Mr. Graves will yield an additional 21,000 emails. What do these emails say in connection with  
 5 Uber's taxi service and "gratuity" charge? Plaintiff will never know if Uber has its way and  
 6 withholds them from production.

7 Uber's burden objection is also not well founded. In fact, due to the nature of this case  
 8 and the size of production in similar class cases, Plaintiff's counsel anticipated Uber's production  
 9 to be in the hundreds of thousands of pages. Uber represented to Magistrate Judge Ryu that  
 10 under Plaintiff's proposal (which sought four additional custodians over a longer period of time)  
 11 the ESI search would yield 87,000 documents. *See* Doc. 74, p. 4. Magistrate Judge Ryu,  
 12 however, did not adopt Plaintiff's proposal and only ordered the inclusion of three of the four  
 13 additional custodians Plaintiff sought and also reduced the date range requested by Plaintiff.  
 14 Therefore, the universe of documents is substantially less than 87,000, only 21,000 of which (at  
 15 least in terms of emails) are from Mr. Kalanick and Mr. Graves. The number of documents Uber  
 16 claims is at issue is neither surprising nor overly burdensome to produce in large-scale consumer  
 17 fraud class actions. *See, e.g., TVIIM, LLC v. McAfee, Inc.*, 13-cv-04545, 2014 WL 5280966, \*2  
 18 (N.D. Cal. Oct. 15, 2014) (ordering defendant to produce emails in response to test search that  
 19 turned up 188,432 emails, subject to search term revisions that would exclude automated  
 20 responses from this number, noting that "[d]iscovery is, by its very nature burdensome"); *Hanni*  
 21 *v. Am. Airlines, Inc.*, No. 08-cv-732, 2009 WL 1505286, \*2 (N.D. Cal. May 27, 2009) (granting  
 22 defendant's motion for sanctions where plaintiff represented that she had 64,000 responsive  
 23 emails and only produced 880 pages); *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit*  
 24 *Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (noting that defendant  
 25 produced "hundreds of thousands of documents" in approving class action settlement).

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27 <sup>1</sup> Magistrate Judge Ryu also limited the date range for the ESI search from April 18, 2011 to  
 28 June 30, 2013, which even further reduces the burden of searching for relevant ESI.

1 To further reduce any claimed burden on Uber, Plaintiff proposes – and requests the  
 2 Court to include in any order on this motion – that Uber only need to review the documents  
 3 generated from the ESI search for a claim of privilege. All remaining documents can be  
 4 produced to Plaintiff and she will have no objection to the volume. This proposal serves two  
 5 purposes: (1) it ensures that Uber is not the sole gatekeeper of what is what is not relevant (after  
 6 all, the search terms themselves are focused on the term “gratuity” in the same document as  
 7 “taxi,” which almost certainly makes all such documents discoverable), and (2) it will make  
 8 Uber’s review quicker and more efficient in having to only identify and withhold attorney  
 9 communications during its internal review. Plaintiff requests the Court to adopt this proposal in  
 10 ruling on this motion.

11 Lastly, Uber’s objection itself demonstrates why Plaintiff needs this production prior to  
 12 filing her motion for class certification. While Plaintiff originally believed she would not need  
 13 the ESI production prior to filing a motion for class certification, Uber has since taken the  
 14 position – as it repeated throughout its motion – that it has a “decentralized business model.” *See*  
 15 Defendant’s Motion for Relief from November 26, 2014 Nondispositive Pretrial Order of  
 16 Magistrate Judge (Doc. 90), p. 2. While this position is simply not credible,<sup>2</sup> Uber is clearly  
 17 attempting to set up as a defense to class certification that the misrepresentations at issue did not  
 18 emanate from its San Francisco headquarters and, therefore, Plaintiff (who is an Illinois resident)  
 19 can not pursue a class action for claims under California’s consumer fraud statutes. Accordingly,  
 20 emails and other ESI from Mr. Kalanick and Mr. Graves, both of whom are executives at Uber’s  
 21 headquarters in San Francisco, are not only relevant to liability issues, but also to the nexus to  
 22 California. If Uber confirms with the Court that it does not intend to raise such a challenge, then  
 23 Plaintiff has no issue with filing her class certification motion before their production. Short of

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24 <sup>2</sup> For example, all five of the cities at issue represented a charge to consumers as a “gratuity”  
 25 when, in fact, Uber kept a portion of that charge for itself. Uber nonetheless insists that such a  
 26 practice was autonomously developed by five different general managers across the country  
 27 completely independent of any centralized decision-making. All five cities also ceased – on the  
 28 same date – keeping a portion of the gratuity charge shortly after Plaintiff filed her lawsuit. Again, according to Uber, this decision would have been independently made by five separate  
 general managers in five different cities that just coincidentally occurred on the same day.

1 such a representation, however, Uber should produce the documents under the agreed-upon  
2 modified schedule.

3 For all of these reasons, it was not clearly erroneous or contrary to law for Magistrate  
4 Judge Ryu to require Uber to include Mr. Kalanick and Mr. Graves as custodians for purposes of  
5 Uber's ESI search. Uber's motion should be denied.

6 Dated: December 12, 2014

7 Respectfully submitted,

8 MYRON M. CHERRY & ASSOCIATES LLC  
9 JACIE C. ZOLNA (PRO HAC VICE)

10 By: /s/ Jacie C. Zolna  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing **Plaintiff's Opposition to Defendant's Motion for Relief From November 26, 2014 Nondispositive Pretrial Order of Magistrate Judge** upon:

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via the electronic filing system on this 12<sup>th</sup> day of December, 2014.

\_\_\_\_\_/s/ Jacie C. Zolna\_\_\_\_